FILE COPY

Office - Supreme Court, U. S.
FILED
AUG 7 1953
HAROLD B. WILLEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 241

TOM WE SHUNG, BY HIS NEXT FRIEND, TOM WING,
Petitioner,

vs.

HERBERT BROWNELL, ATTORNEY GENERAL OF THE UNITED STATES, AND WATSON B. MILLER, COMMISSIONER OF IMMIGRATION

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT FOR THE DISTRICT OF COLUMBIA CIRCUIT.

JACK WASSERMAN,
Warner Building, Washington, D. C.,
Attorney for Petitioner.

ANDREW REINER, ESQ.,
Of Counsel.

INDEX

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutes Involved	2
Statement	3
Reasons for Granting the Writ	4
Conclusion	5

Citations

Cases:

Barnett v. *Mayes*, 643 F. 2d 521	5
Heikkila v. *Barber*, 345 U.S. 229	4, 5
Joy v. *Hague*, 175 F. 2d 395	4
Mansfield C & L.M.R. Co. v. *Swan*, 111 U.S. 379	4
McCrane v. *United States*, 100 F. 2d 322	5
United States v. *Corrick*, 298 U. S. 435	4
United States v. *Cusson*, 132 F. 2d 413	4, 5

Statutes:

Immigration Act of February 5, 1917 (39 Stat. 887; 8 U.S.C. 153)	2
Immigration Act of December 28, 1945 (59 Stat. 659; 8 U.S.C. 232)	2

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. —

TOM WE SHUNG, BY HIS NEXT FRIEND, TOM WING,
Petitioner,

vs.

HERBERT BROWNELL, ATTORNEY GENERAL OF THE UNITED STATES, AND WATSON B. MILLER, COMMISSIONER OF IMMIGRATION

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioner, Tom We Shung, by his next friend Tom Wing, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the District of Columbia (R. 16), affirming a judgment of the District Court for the District of Columbia in favor of respondents.

Opinions Below

The Court of Appeals affirmed the judgment of the District Court in a per curiam opinion (R. 13). The opinion of the District Court is reported at 103 F. Supp. 507 (R. 7).

Jurisdiction

The judgment of the Court of Appeals was entered on July 2, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented

1. In view of *Heikkila* v. *Barber*, 345 U. S. 229, did the courts below have jurisdiction to render a declaratory judgment in an exclusion proceeding where the order of exclusion was rendered and the action instituted prior to the effective date of the Immigration and Nationality Act of 1952 (66 Stat. 163)?

2. Where the Court of Appeals has serious doubt as to its jurisdiction, should it decide the merits of the controversy without deciding the issue of jurisdiction?

Statutes Involved

Section 17 of the Immigration Act of February 5, 1917 as amended, 39 Stat. 887 (8 U. S. C. 153) provides in part:

> "In every case where an alien is excluded from admission into the United States, under any law or treaty now existing or hereafter made, the decision of a board of special inquiry adverse to the admission of such alien shall be final, unless reversed on appeal to the Attorney General."

The Immigration Act of December 28, 1945, 59 Stat. 659, 8 U. S. C. 232 provides as follows:

> "Notwithstanding any of the several clauses of Section 136 of this title, excluding physically and mentally defective aliens, and notwithstanding the documentary requirements of any of the immigration laws or regula-

tions, Executive orders, or Presidential proclamations issued thereunder, alien spouses or alien children of United States citizens serving in, or having an honorable discharge certificate from the armed forces of the United States during the Second World War shall, if otherwise admissible under the immigration laws and if application for admission is made within three years of December 28, 1945, be admitted to the United States: * * *"

Statement

Petitioner's complaint alleges that he is the blood son of Tom Wing, a World War II veteran and citizen of the United States and that he was admissible to the United States on November 28, 1947 when he arrived at San Francisco and sought entry as the alien son of a veteran pursuant to 8 U. S. C. 232. (R. 1) A three man board of special inquiry consisting of two immigrant inspectors and a clerk stenographer voted to exclude petitioner. One inspector and the clerk stenographer were not present during the first day of hearing when petitioner testified. On appeal to the Board of Immigration Appeals the order of exclusion was affirmed. Petitioner sought a judgment declaring that his hearing before the board of special inquiry was unfair because of failure to comply with the Administrative Procedure Act, because of the composition of the board of special inquiry, because those who heard his testimony were not the same individuals who rendered the decision and because the order of exclusion was not supported by substantial evidence.

The courts below have ruled that the board of special inquiry was properly composed, that timely objection was not made administratively on this issue, that the Administrative Procedure Act was inapplicable, and that the hearing was fair and a determination of exclusion justified. Petitioner seeks certiorari from a per curiam affirmance of the District Court's decision.

The case was argued in the Court of Appeals subsequent to this court's decision in *Heikkila* v. *Barber*, 345 U. S. 229. The Court of Appeals recognized that that decision "may suggest a serious question as to the right of judicial review of an exclusion order except by the limited process of habeas corpus." Nevertheless, without deciding the jurisdictional issue, the Court of Appeals affirmed on the merits.

Reasons for Granting the Writ

This writ of certiorari is sought because the issues presented herein raise important questions of federal practice and because the decision of the Court of Appeals thereon is in conflict with decisions of this court as well as with decisions of other circuits.

1. The decision below assuming jurisdiction to decide the merits of the controversy herein without deciding the jurisdictional issue is in conflict with this court's decision in *United States* v. *Corrick*, 298 U. S. 435, 440 and *Mansfield C. & L. M. R. Co.* v. *Swan*, 111 U. S. 379. In the *Mansfield* case it was observed that:

> "on every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested and without respect to the relation of the parties to it."

The decision of the court below in neglecting to pass upon the jurisdictional issue and in deciding the merits, was contrary to the aforementioned decisions of this Court.

2. The court below should have dismissed the action solely on the basis of lack of jurisdiction rather than the merits if jurisdiction did not exist. In deciding the merits and passing over the jurisdictional issue, the court below acted contrary to decisions in other circuits. *Joy* v. *Hague*, 175 F. 2d 395 (C. C. A. 1, 1949); *United States* v. *Cusson*,

132 F. 2d 314 (C. C. A. 2, 1942); *McCrone* v. *United States*, 100 F. 2d 322 (C. C. A. 9, 1938), affirmed 307 U. S. 61; *Barnett* v. *Mayes*, 43 F. 2d 521 (C. C. A. 10, 1930).

The prevailing rule which was not followed by the court below is expressed in *United States* v. *Cusson, supra*, a decision by Circuit Judge Learned B. Hand as follows: The appellate court

> "is always under a duty to examine its jurisdiction *ex mero motu* and can never properly undertake to pass upon the merits till it has done so."

3. The decisions below are in conflict with *Heikkila* v. *Barber*, 345 U. S. 229 which holds that a declaratory judgment action may not be maintained in a case filed prior to to the Immigration and Nationality Act of 1952 (66 Stat. 163).

Conclusion

The decision below is in conflict with decisions of this Court and with the prevailing views of other circuits. Whether a federal court can pass upon the merits of a controversy without first inquiring into its own jurisdiction obviously involves an important question of federal procedure and practice. The decision below enunciates a novel principle which has not heretofore been approved by this Court nor by other circuits. It is for these reasons that petitioner respectfully requests that certiorari be granted.

Respectfully submitted,

JACK WASSERMAN,
Warner Building, Washington 4, D. C.,
Attorney for Petitioner.

ANDREW REINER, ESQ.,
Of Counsel.

(9480)

BLEED THROUGH — POOR COPY